

The Government Transparency and Accountability Project

P.O. Box 2134
Madison, WI 53701-2134
(608) 255-0688
Fax: (608) 255-0788

Leslie Graves, Director
l.graves@lucyburns.org

February 19, 2007

Overview

This report about the status of open records legislation and compliance in Montana has been prepared by the Government Transparency and Accountability Project at the request of Trevis Butcher, Winifred, Montana.

The Government Transparency and Accountability Project is a project of the non-profit, non-partisan group Citizens in Charge.

The mission of the Government Transparency and Accountability Project (GTAP) is to assist citizens with open records requests at the state and local level.

In September 2006, GTAP assisted Trevis Butcher with open records requests filed with school districts, cities and counties in Montana.

This report reviews:

- the open records law in Montana;
- how Montana's open records laws are viewed by national organizations that study state-level open records laws;
- what was learned about open records compliance from Mr. Butcher's study;
- areas for improvement.

The open records law in Montana: history and current status

Montana provides for public access to records both through statute (Mont. Code. Ann. Secs. 2-6-101 to 2-6-111; 2-6-201 to 2-6-405) and in its Constitution, which provides in Article II, Section 9 (2001) that:

"no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies ... except in cases in which the demand for individual privacy clearly exceeds the merits of public disclosure."

While many other states first passed laws guaranteeing the right of the public to inspect and obtain copies of public documents in the wake of Watergate in the 1970s, Montana has the distinction of having passed its first open records law in 1895, six years after statehood.

Attorney Peter Michael Meloy, of Meloy & Morrison in Helena, in preparing an introduction to Montana's open records laws for the Open Government Guide published by the Reporters Committee for Freedom of the Press, wrote:

"As might be expected, however, these constitutional and legislative efforts have not lessened the tendency of governmental bodies toward secrecy. Montana officials, not unlike officials in other states, believe the public's business can most efficiently be carried on in secret. Thanks to a vigilant press and active public interest groups willing to litigate, Montana government has not been covert with impunity."

How Montana's laws are viewed by groups that provide national rankings

In the last several years, two national organizations have provided state-by-state comparison rankings of open records legislation.

Montana has not fared well in these state rankings.

For example, the Better Government Association¹, with the assistance of Investigative Reporters and Editors, Inc.², conducted a state-by-state survey in 2002 about the comparative ability of citizens in different states to obtain copies of public documents. This report is known as the BGA Integrity Index.³

On this report, Montana ranks 44 out of 50, with an overall grade of "F". Out of 16 possible "openness" points, Montana earned 1.5 points.

The five areas the Better Government Association considered in reaching its conclusions about state laws were (a) the amount of time a public agency is given to respond to a request, (b) the appeal process available to citizens when requests are denied, (c) whether appeals are expedited, (d) whether citizens who take denials to court are awarded attorney's fees if they prevail and (e) whether any punishments—civil or criminal—are given to public officials who illegally deny requests for records.

The Marion Brechner Citizen Access Project⁴ is part of the University of Florida. The Citizen Access Project provides an online database of open records legislation in all 50 states, allowing readers to compare provisions from state-to-state.

The Citizen Access Project provides a "Sunshine Index" that ranks different parts of the law. Each part of the open records law of each state is given a numerical ranking between 1 and 7, where 1 = "completely closed" and 7 = "completely open".

The Citizen Access Project ranks Montana's laws as either a 1, 2 ("nearly dark") or 3 ("somewhat closed") in 24 of the 39 areas considered. One particular area of concern is that "No law directly indicates that agencies have a responsibility to maintain separate indices for public records stored on computers."

¹ See the Better Government Association's website at <http://www.bettergov.org/>. BGA is a non-profit, non-partisan group that was founded in 1923.

² The Investigative Reporters and Editors website is <http://www.ire.org/>. IRE is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. It was formed in 1975.

³ See http://www.bettergov.org/pdfs/policy_integrityindex_2002.pdf. This report was funded in part by the Ford Motor Company Center for Global Citizenship. See pages 7-12 for the section pertaining to open records legislation.

⁴ <http://www.citizenaccess.org>. "The goal of the Citizen Access Project is to allow citizens and public officials to better understand public access to local government information in all 50 states."

What was learned from Mr. Butcher's 2006 study

In September and October 2006, the Government Transparency and Accountability Project at the request of Mr. Trevis Butcher of Winifred, Montana, filed open records requests with a variety of Montana government agencies.

Mr. Butcher's public records requests primarily asked for (1) copies of documents pertaining to internet use policies and (b) electronic records pertaining to petition drives.

In other states where "FOIA audits" have been conducted in the last five years, those conducting the studies have found low rates of compliance. This was true of Mr. Butcher's open records requests, which had a low rate of compliance.

For example, Mr. Butcher requested a copy of written internet use policies from 192 school districts. 117 of the districts did not respond (a 61% non-compliance rate). 67 of the districts (34%) responded with an identical request for clarification drafted by legal staff for the Montana School Boards Association. **2 out of 192 school districts sent Mr. Butcher a copy of their written internet use policies.**

Mr. Butcher subsequently asked 55 school districts, of those who had responded with an identical "request for clarification", to provide copies of documents pertaining to how it is that they came to provide responses identical to those from other school districts. 50 out of the 55 school districts (or 90%) have yet to respond to this open records request.

City and county governments had a higher rate of compliance—but still only 30%--to requests for their written internet use policies.⁵

⁵ Spreadsheets and files are available for inspection.

Areas for improvement

"A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty."

■ 110 Congressional Record 17, 087 (1964) (Statement of Senator Long)

Included here are some ideas that have been tried or proposed in other states in order to improve the climate of government openness, accountability, and citizen access to public records.

- Statutory deadlines for open records responses;
- A state government open records ombudsman or board;
- No charge for the first hour of searches;
- Penalties for non-compliance;
- Set standards for local government units (cities, counties, school districts, etc.) to consult in providing information on their websites about how to approach them for open records;
- Commission to review open records laws versus other states and desired outcomes in order to recommend comprehensive legislative changes;
- Provide training to local government officials about the open records law and how to comply with it;
- Given that the many intergovernmental communications are now electronic, consider ways to encourage local governments to comply with the new (December 1, 2006) Federal Rules of Civil Procedure governing search and archive procedures for electronic documents, so that electronic documents are genuinely searchable and available to citizens who request them.
- Commission to consider recommendations for local taxing entities to place certain documents on their websites (meeting minutes, check registers, others) so that citizens don't have to formally request them.